

# PEOPLE V. DREW—WILL CALIFORNIA'S NEW INSANITY TEST ENSURE A MORE ACCURATE DETERMINATION OF INSANITY?

*Psychiatrists, courts, and laymen continue to disagree as to what standard of conduct should constitute a defense to criminal responsibility. Recently, the California Supreme Court redefined the legal test for insanity, adopting the more expansive view favored by many psychiatrists. This Comment analyzes the court's reasoning in adopting the new standard and examines the standard's purported advantages in light of psychiatric findings and judicial experience with various insanity tests. The author expresses the hope that the legislature will reexamine the problem and promulgate a more appropriate definition of criminal insanity.*

## INTRODUCTION

In *People v. Drew*<sup>1</sup> the California Supreme Court abandoned the *M'Naghten* rule and adopted the American Law Institute (ALI) test for determining insanity in criminal trials. The thesis of this Comment is that the new insanity test does not ensure a more just and accurate determination of insanity than did the *M'Naghten* test. *Drew* will not clarify psychiatric testimony so as to enable jurors to make a reasoned choice. Nor will the new test be any easier to apply than *M'Naghten*. Because of the court's failure to evaluate all the available data concerning both judicial experience with psychiatric testimony and the reliability of psychiatric diagnosis, the new formula does not achieve those changes which the court perceived as necessary.

Part one of this Comment reviews the history of the insanity test in California. Part two describes the *Drew* opinion. Part three discusses why it was wrongly decided.

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1. 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978).

Since 1864 California has used the *M'Naghten* test to define the defense of insanity in criminal proceedings.<sup>2</sup>

[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.<sup>3</sup>

Responding to the recommendations of the Commission for the Reform of Criminal Procedure, the California legislature in 1927 enacted the separate trial provisions presently found in California Penal Code section 1026.<sup>4</sup> The statute provides that a defendant who pleads guilty by reason of insanity shall be tried twice.<sup>5</sup> In the first trial, the defendant is conclusively presumed to be sane when the offense was committed and is tried on the issue of guilt only.<sup>6</sup> At this trial he may enter whatever other defenses are available.<sup>7</sup> If the defendant is found guilty, he is tried again. The sole issue at the second trial is whether the defendant was insane when the offense was committed.<sup>8</sup>

During the 100 years after the adoption of *M'Naghten*, the courts strictly construed the *M'Naghten* test's language.<sup>9</sup> Only those defendants who lacked the cognitive capacity to realize the wrongfulness of their conduct were treated as insane.<sup>10</sup> In contrast with this judicial interpretation of insanity, modern psychiatry repudiated the "compartmentalization of the mind" theory

2. *People v. Kelly*, 10 Cal. 3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (1973); *People v. Nicolaus*, 65 Cal. 2d 866, 423 P.2d 787, 56 Cal. Rptr. 635 (1967); *People v. M'Donnell*, 47 Cal. 134 (1873); *People v. Coffman*, 24 Cal. 230, 235 (1864).

3. *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (1843); *accord*, *People v. Coffman*, 24 Cal. 230, 235 (1864) (slight variation in language).

4. Ch. 346, 1925 Cal. Stats.; CALIFORNIA COMMISSION FOR THE REFORM OF CRIMINAL PROCEDURE, REPORT 16, 17 (1927); *The Reform of Criminal Procedure*, 1 CAL. ST. B.J. 103, 104 (1926).

5. CAL. PENAL CODE § 1026 (Deering 1979) provides:

When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried. . . .

6. *Id.*

7. *Id.*

8. *Id.*

9. *See People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964). This was the first time the California Supreme Court sanctioned a broadening of the narrow *M'Naghten* "knowledge" test. During the period from 1864 to 1964 the California Supreme Court had strictly interpreted the "knowledge" term.

10. *United States v. Freeman*, 357 F.2d 606, 616-17 (2d Cir. 1966).

which was the basis of the *M'Naghten* doctrine.<sup>11</sup> During the present century psychiatrists have extensively criticized the *M'Naghten* rule.<sup>12</sup> They contend that mental illness may have little or no impact upon an individual's capacity to comprehend that what he is doing is wrong and unlawful.<sup>13</sup> Insanity may affect the entire personality of an individual, including his ability to control his behavior.<sup>14</sup> Consequently, the *M'Naghten* critics assert that focus upon the "knowledge" element of the test causes the imprisonment rather than the treatment of mentally handicapped offenders.<sup>15</sup>

In *People v. Wolff*,<sup>16</sup> the California Supreme Court acknowledged these criticisms of *M'Naghten* and adopted a liberal interpretation of the rule. The term "know" was construed to mean the possession of sufficient mental capacity to "appreciate or understand" the nature and quality of the defendant's act.<sup>17</sup> The insanity test was expanded to include examination of the offender's ability to reflect maturely and meaningfully upon the morality and gravity of his contemplated act.<sup>18</sup> Under a strict construction of *M'Naghten's* "knowledge" requirement, many offenders were able to articulate a knowledge of the wrongfulness of their conduct, yet were incapable of intellectually and morally understanding that what they had done should be repulsive to them.<sup>19</sup> Mere capacity to articulate knowledge of wrong was sufficient to deny the insanity defense prior to *Wolff*.<sup>20</sup> Under *Wolff's* liberal interpretation of the standard, the defense would be denied only if the

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11. See A. GOLDSTEIN, *THE INSANITY DEFENSE* 46 (1967). The objection to the *M'Naghten* rule is that it does not comport with modern theories of medical science. Modern psychiatry is opposed to the older theory which divides the mind into the separate compartments of the will, the emotions, and the intellect. See *United States v. Freeman*, 357 F.2d 606, 622 (2d Cir. 1966); H. SILVING, *ESSAYS ON MENTAL INCAPACITY AND CRIMINAL CONDUCT* 92 (1967).

12. S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 183-86 (1925).

13. *Id.*

14. *Id.* at 99-122.

15. BRITISH HOME OFFICE, DEPT. OF HEALTH AND SOC. SEC., *REPORT OF THE COMMITTEE ON MENTALLY ABNORMAL OFFENDERS* 218 (Oct. 1975) [hereinafter cited as *BRITISH COMMITTEE*]. The English Committee agreed with the other commentators that if *M'Naghten* were strictly interpreted, it would provide limited protection to most classes of mentally disordered offenders.

16. 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

17. *Id.* at 800-01, 394 P.2d at 961-62, 40 Cal. Rptr. at 274.

18. *Id.*

19. *Id.*

20. *Id.*

defendant truly understood the moral evil of his conduct.<sup>21</sup> Thus, the new interpretation of insanity permitted more defendants to successfully invoke the insanity defense.

Another line of California cases commencing with *People v. Wells*<sup>22</sup> developed the concept of "diminished capacity" to further ameliorate the sometimes harsh effect of *M'Naghten*. Despite the statutory bifurcation prohibiting introduction of evidence of the defendant's insanity at the guilt stage, *Wells* approved the admission of evidence of diminished mental capacity which tended to disprove specific criminal intent.<sup>23</sup> The court held that admission of such evidence was required by due process because evidence of diminished capacity tends to disprove an element of the crime.<sup>24</sup> Subsequent cases expanded *Wells* to allow admission at the guilt phase of evidence of diminished mental capacity caused by intoxication, trauma, or disease tending to disprove intent.<sup>25</sup> In *People v. Cantrell*,<sup>26</sup> the rule was extended to encompass the impairment of volition. *Cantrell* held that a defendant who raises the defense of diminished capacity at the guilt phase of trial may demonstrate that his act was the product of an irresistible impulse resulting from mental disease.<sup>27</sup> The most recent decision in this line, *People v. Wetmore*,<sup>28</sup> compels trial courts to admit all evidence of insanity at the guilt phase on the issue of specific intent to commit the crime charged. *Wetmore* declares that the attempt to distinguish evidence of insanity from evidence of diminished capacity is illogical because it keeps out evidence of the defendant's mental condition.<sup>29</sup> The court reasoned that the

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21. *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

22. 33 Cal. 2d 330, 202 P.2d 53 (1949).

23. *Id.* at 349, 202 P.2d at 65.

24. *Id.* at 346, 351, 355, 202 P.2d at 63, 66, 68.

25. See, e.g., *People v. Bassett*, 69 Cal. 2d 122, 443 P.2d 777, 70 Cal. Rptr. 193 (1968); *People v. Goedecke*, 65 Cal. 2d 850, 423 P.2d 777, 56 Cal. Rptr. 625 (1967); *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966); *People v. Goshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959).

26. 8 Cal. 3d 672, 504 P.2d 1256, 105 Cal. Rptr. 792 (1973).

27. *Id.* at 685, 504 P.2d at 1264, 105 Cal. Rptr. at 800-01. See generally H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 94-100 (1954). See also T. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY* 131-32 (1963).

28. 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978).

29. *Id.* Admission of evidence of insanity at the guilt phase of trial was originally perceived as a danger to be avoided. It was feared that such a liberal evidentiary rule would permit the defendant to submit great masses of information having no bearing upon the question of whether the offense was committed. As a consequence, the jury would be unduly influenced by sympathy or confused as to the issue. CALIFORNIA COMMISSION FOR THE REFORM OF CRIMINAL PROCEDURE, REPORT 16-17 (1927).

It appears that the Commission failed to explore the full legal ramifications of excluding evidence of mental impairment upon the issue of intent. For criticism and comment, see Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CALIF. L. REV. 805, 810 (1961).

purpose of admitting evidence of mental impairment was to mitigate or rebut elements of the crime charged.<sup>30</sup> Therefore, it would be unfair to deny admission of such evidence even though it may suggest a higher degree of mental incapacity.<sup>31</sup>

With the exception of the bifurcated trial statute, the legislature remained silent upon the issue of criminal insanity throughout this period of case law development. Because the bifurcation statute effected only procedural changes in the insanity rule, the California Supreme Court construed the absence of substantive change as tacit legislative approval of *M'Naghten*.<sup>32</sup> For a period of sixty years, the California courts rejected attacks on *M'Naghten* and declined to adopt proposals for a new insanity definition because they viewed the legislature as better equipped to manage the complex fact finding such a decision would necessitate.<sup>33</sup>

#### PEOPLE V. DREW—THE NEW INSANITY TEST

The legal test for insanity in California is no longer the *M'Naghten* rule but rather subpart 1 of the American Law Institute test: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."<sup>34</sup> In adopting the ALI rule, the California

30. *People v. Wetmore*, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978).

31. *Id.*

32. "The 1927 legislation upon its face effected only procedural changes . . . but it is apparent that the Legislature had in mind the substantive law as to insanity. . . ." *People v. Nash*, 52 Cal. 2d 36, 47, 338 P.2d 416, 422 (1959).

33. Unanimous decisions upholding *M'Naghten* and indicating that the legislature would be the proper forum for change include: *People v. Kelly*, 10 Cal. 3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (1973); *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964); *People v. Darling*, 58 Cal. 2d 15, 372 P.2d 316, 22 Cal. Rptr. 484 (1962); *People v. Rittger*, 54 Cal. 2d 720, 355 P.2d 645, 7 Cal. Rptr. 901 (1960); *People v. Nash*, 52 Cal. 2d 36, 338 P.2d 416 (1959); *People v. Berry*, 44 Cal. 2d 426, 282 P.2d 861 (1955); *People v. Daugherty*, 40 Cal. 2d 876, 256 P.2d 911 (1953); *People v. Hickman*, 204 Cal. 470, 268 P. 909 (1928).

34. In full, the ALI test states:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

Supreme Court deliberately deferred considering subpart 2 of the test which denies the defense to sociopaths and psychopaths.<sup>35</sup> Historically, these types of offenders have been precluded from asserting the insanity defense in California.<sup>36</sup> Whether psychopaths will be allowed to assert the insanity defense remains an open issue.

In *Drew*, the defendant violently resisted the attempts of two police officers to remove him from a bar where he had started a fight. Drew pleaded not guilty and not guilty by reason of insanity to the charges of battery, obstructing an officer, and disturbing the peace. Two court-appointed psychiatrists testified that the defendant was unable to appreciate the difference between right and wrong.<sup>37</sup> Despite this testimony, the jury found Drew guilty.

Neither defendant's appellate brief nor his petition for rehearing attacked the trial court's jury instruction based upon the *M'Naghten* rule.<sup>38</sup> The California Supreme Court, however, perceived the appeal as an opportunity to jettison the established test and remanded the case for retrial under the ALI standard.<sup>39</sup>

Replacement of the *M'Naghten* test was based on the following assumptions: (1) the ALI test would permit psychiatrists to explain the basis for the conclusions to the jury; (2) the ALI test is superior because it is more closely attuned to modern psychiatric theory and possesses the flexibility to adopt new theories; (3) the ALI language is more modern and therefore superior to the *M'Naghten* language; and (4) the ALI test would rationalize the inconsistent interpretations of diminished capacity.<sup>40</sup>

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MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962). Subpart 1 is cited in *People v. Drew*, 22 Cal. 3d 333, 336, 337 n.3, 345, 583 P.2d 1318, 1319 n.3, 1324, 149 Cal. Rptr. 275, 276 n.3, 281 (1978).

35. *People v. Drew*, 22 Cal. 3d 333, 345 n.8, 583 P.2d 1318, 1324 n.8, 149 Cal. Rptr. 275, 281 n.8 (1978). Psychopaths have been characterized as persons who are intellectually aware of the consequences of their acts but feel no remorse or pity and are abnormally disposed toward repeated commission of criminal acts. See generally H. WEIHOFEN, *THE URGE TO PUNISH* 87-90 (1956).

36. By definition, psychopaths could not qualify under *M'Naghten* because they were aware of the wrongfulness of their conduct. See H. WEIHOFEN, *THE URGE TO PUNISH* 87-90 (1956).

37. *People v. Drew*, 22 Cal. 3d 333, 338-39, 583 P.2d 1318, 1319-20, 149 Cal. Rptr. 275, 276-77 (1978).

38. *Id.* at 339 n.4, 583 P.2d at 1320 n.4, 149 Cal. Rptr. at 277 n.4.

39. *Id.* at 337, 583 P.2d at 1319, 149 Cal. Rptr. at 276. Shortly after *Drew* was decided, the California Supreme Court extended the ALI definition of insanity to include the defense of idiocy and mental retardation in *In Re Ramon M.*, 22 Cal. 3d 419, 584 P.2d 524, 149 Cal. Rptr. 387 (1978).

40. *People v. Drew*, 22 Cal. 3d 333, 346, 583 P.2d 1318, 1325, 149 Cal. Rptr. 275, 282 (1978).

WHY *DREW* IS WRONGLY DECIDED

The liberal interpretation of the *M'Naghten* test by the California courts was accepted by a number of commentators as a fair standard for assessing criminal responsibility.<sup>41</sup> Some jurists, however, persisted in condemning any insanity test premised on *M'Naghten*.<sup>42</sup> They objected on the ground that modern psychiatry had repudiated *M'Naghten*'s exclusive emphasis upon the cognitive aspects of human personality.<sup>43</sup> It was believed that *M'Naghten* was inconsistent with "modern medical knowledge that an individual is a mentally complex being with varying degrees of awareness."<sup>44</sup>

*Drew* adopted the reformist view despite the ameliorative effect of the *Wolff* doctrine and the diminished capacity concept upon *M'Naghten*'s "knowledge of wrongfulness" requirement.<sup>45</sup> However, the new test is no more likely to remedy the defects of the insanity determination than the modern interpretation of *M'Naghten*.<sup>46</sup> The court failed to consider both historical experi-

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41. "[R]egardless of how the *M'Naghten* test is applied elsewhere, the California courts have attempted to give a psychologically sound recognition to the depth and insight required of a defendant's knowledge." SPECIAL COMMISSION ON INSANITY AND CRIMINAL OFFENDERS, FIRST REPORT 23 n.6 (1962).

"[E]xpansion of diminished capacity to its present state must please those critics of *M'Naghten* [sic] who have longed for a medical-psychiatric test of insanity." Comment, *Diminished Capacity: The Middle Ground of Criminal Responsibility*, 15 SANTA CLARA L. REV. 911, 937 (1974-75); see Comment, *Diminished Capacity: Its Potential Effect in California*, 3 LOY. L.A.L. REV. 153, 167 (1970).

42. The Third Circuit Court of Appeals viewed adherence to even the modern interpretation of the *M'Naghten* rule as unjustified. *United States v. Currens*, 290 F.2d 751, 765-66 (3d Cir. 1961). Justice Mosk adopted this same point of view in his concurring opinion in *People v. Kelly*, 10 Cal. 3d 565, 578, 516 P.2d 875, 884, 111 Cal. Rptr. 171, 180 (1973).

The California Penal Code Revision Committee recommended change of the *M'Naghten* rule because it was allegedly invalid from a psychiatric standpoint. However, the committee noted that change would have little impact upon practice. Sherry, *Penal Code Revision Project—Progress Report*, 43 CAL. ST. B.J. 900, 916 (1968).

43. "[*M'Naghten*] still . . . falls short of acknowledging the teaching of psychiatry that mental aberration may not only impair knowledge of wrongfulness but may very well destroy an individual's capacity to control or to restrain himself." Sherry, *Penal Code Revision Project—Progress Report*, 43 CAL. ST. B.J. 900, 916 (1968).

44. A. GOLDSTEIN, *supra* note 11, at 56-57. See generally H. WEIHOFEN, *THE URGE TO PUNISH* 84 (1956).

45. *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964); *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949).

46. See text accompanying notes 49-124 *infra*.

ence with psychiatric opinion under the various insanity tests and the empirical studies dealing with diagnosis and treatment of the criminally insane.<sup>47</sup> These studies indicate that judicial reliance on contemporary psychological theory is misplaced.<sup>48</sup>

### *Drew Will Not Prevent Conclusory Psychiatric Testimony*

In the *Drew* majority opinion, Justice Tobriner argued that the ALI formula was superior to *M'Naghten* because the ALI standard was "broad enough to permit a psychiatrist to set before the trier of fact a full picture of the defendant's mental impairments. . . ."<sup>49</sup> This argument reiterates the *M'Naghten* critics' most common complaint, that *M'Naghten* keeps out evidence of the defendant's mental state, denying the jury an accurate picture of defendant's mental state.<sup>50</sup> This exclusion of probative evidence is supposedly attributable to the courts' practice of admitting only expert testimony that satisfies the wording of the particular insanity test. For example, a judge subscribing to *M'Naghten* would contend that only psychiatric evidence of cognitive impairment could be admitted because the test speaks in terms of knowledge.<sup>51</sup>

What has actually occurred in practice, however, discredits this complaint. The policy of most courts has been to admit any evidence probative of mental aberration regardless of the phraseology of the insanity rule.<sup>52</sup> For example, the American Law Institute found no American case in which psychiatric evidence

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47. For historical experience, see text accompanying notes 49-63 *infra*. For empirical studies, see text accompanying notes 64-89 *infra*.

48. Modern psychiatry lacks the quantitative accuracy of the other sciences and should not be regarded as if it possesses equivalent reliability. Generally, psychiatrists have been unsuccessful in predicting recidivism and have failed to communicate with both the subjects of their examination and the jury. Comment, *The Psychiatrist's Role in Determining Accountability for Crimes: The Public Anxiety and an Increasing Expertise*, 52 MARQ. L. REV. 380, 382 (1969); see, e.g., Katz, Cole, & Lowery, *Studies of the Diagnostic Process: The Influence of Symptom Perception, Past Experience, and Ethnic Background in Diagnostic Decisions*, 125 AM. J. PSYCH. 937 (1969).

49. *People v. Drew*, 22 Cal. 3d 333, 346, 583 P.2d 1318, 1325, 149 Cal. Rptr. 275, 282 (1978).

50. A. GOLDSTEIN, *supra* note 11, at 53.

51. *Id.* at 53-58.

52. For a statement of the basis for admissible evidence when there is expert testimony, see CAL. EVID. CODE § 802 (West 1978).

"The first and fundamental rule, then, will be that *any and all conduct* of the person is admissible in evidence. There is no restriction as to the kind of conduct. There can be none; for if a specific act does not indicate insanity it may indicate sanity." J. WIGMORE, WIGMORE ON EVIDENCE § 228 (1904). See also *People v. David*, 12 Cal. 2d 639, 86 P.2d 811 (1939) (dealing with the scope of rebuttal conduct a prosecutor may introduce); Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761, 774 (1956).



probative of insanity was rejected by the trial court because it did not fit the test language.<sup>53</sup> Similarly, Judge Bazelon of the District of Columbia Court of Appeals noted that after twenty-five years of trying insanity cases, the only limitations imposed on the admissibility of evidence were made by psychiatrists themselves.<sup>54</sup> He found that psychiatrists uniformly limited their testimony to conclusory statements couched in psychiatric terms and failed to explain the reasons behind their conclusions.<sup>55</sup> Such testimony was narrowly tailored to fit the language of the particular insanity test.<sup>56</sup>

The *Durham*<sup>57</sup> experiment illustrates the lack of any causal relationship between the insanity test terminology and the capacity of psychiatrists to explain their opinions. The *Durham* test was adopted and used by the District of Columbia Court of Appeals for a number of years and later abandoned because of judicial dissatisfaction with its application.<sup>58</sup> The *Durham* test set forth the following definition of insanity: "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."<sup>59</sup> Psychiatrists favored this test above all other popular formulas because it most closely approached their concept of mental disorders.<sup>60</sup> Prior to its adoption in the District of Columbia Court of Appeals, psychiatrists clamored for a standard that would permit a dynamic and accurate description of the

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53. MODEL PENAL CODE § 4.01, app. A at 162 (Tent. Draft No. 4, 1955).

Analysis of numerous trial transcripts shows that psychiatrists are permitted to explain their interpretation of the *M'Naghten* "know" term regularly. The *M'Naghten* test does not straitjacket psychiatric testimony. A. GOLDSTEIN, *supra* note 11, at 56.

Psychosis is the term psychiatrists use to define severe mental disorder characterized by delusions, visions, and loss of intellectual capacity. This is the disorder that has been associated with the *M'Naghten* "knowledge" element. See H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 14-16 (1954).

54. Bazelon, *Psychiatrists and the Adversary Process*, SCIENTIFIC AM., June 1974, at 18.

55. *Id.* at 20. "Psychiatry, I suppose, is the ultimate wizardry. . . . [I]n no case is it more difficult to elicit productive and reliable expert testimony than in cases that call on the knowledge and practice of psychiatry." *Id.* at 18.

56. *Id.* at 21.

57. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

58. Bazelon, *Psychiatrists and the Adversary Process*, SCIENTIFIC AM., June 1974, at 18, 21.

59. *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

60. G. MORRIS, *THE INSANITY DEFENSE: A BLUEPRINT FOR LEGISLATIVE REFORM* 14 (1975); Bazelon, *Psychiatrists and the Adversary Process*, SCIENTIFIC AM., June 1974, at 18, 40.

human psyche.<sup>61</sup> However, after the adoption of *Durham*, psychiatrists continued to testify in conclusory terms patterned after the test language.<sup>62</sup> Thus, under the most liberal definition of insanity, the juries received as little psychiatric explanation of the defendant's mental problems as they did under *M'Naghten*.<sup>63</sup>

It is unlikely that adoption of the ALI test will provide psychiatrists with any greater opportunity to "set before the trier of fact a full picture of defendant's mental impairments" than they had under *M'Naghten*. Psychiatrists will probably continue to testify in conclusory terms that adopt the test language. Detailed psychiatric explanation of the defendant's mental impairment would more likely be accomplished by adopting strict evidentiary rules that restrict testimony composed of psychiatric conclusions, and by requiring that the nature of the defendant's illness be first explained in simple language.

### *Deference to Modern Psychiatry May Not Result in More Reliable Determinations of Insanity*

Although psychiatric claims are gaining wider acceptance in American society, many behavioral scientists are beginning to question the liberal faith which has urged greater acceptance of psychiatric discoveries and expansion of the insanity defense.<sup>64</sup> *People v. Drew* is an example of the judicial inclination to shape

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61. Bazelon, *Psychiatrists and the Adversary Process*, SCIENTIFIC AM., June 1974, at 18, 20.

62. *Id.* at 21.

63. *Id.* Some commentators suggest that psychiatric testimony should not be proscribed only as to conclusory evaluations but should be strictly curtailed or eliminated altogether. See generally BRITISH COMMITTEE, *supra* note 15, at 222; Fosdal, *Contributions and Limitations of Psychiatric Testimony*, 50 WIS. BULL. 31, 34 (April 1977).

The proposal to curtail psychiatric testimony is predicated upon courtroom frustration with conflicting expert testimony and the pervasive influence of subjective "lay" considerations. In one Swedish study, researchers found that the consistently determinative factors in psychiatric findings depended upon the nature of the crime and the incidents of prior convictions or prior hospitalizations. The study concluded that the need for expert testimony was obviated by the fact that a judge or jury was just as capable of assessing these elements as was a psychiatrist. Reisner & Semmel, *Abolishing the Insanity Defense: A Look at the Proposed Federal Criminal Code Reform Act in Light of the Swedish Experience*, 62 CALIF. L. REV. 753, 781 (1974).

64. A. GOLDSTEIN, *supra* note 11, at 101-05. Psychiatrists disagree on the definition of even the most basic terms such as psychosis, mental illness, and psychopathy. Invariably, value judgments greatly influence any categorization of the individual defendant. When more than a single psychiatrist testifies, conflict usually results. Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 546 (1968). See, e.g., Goldberg, *The Effectiveness of Clinicians' Judgments: The Diagnosis of Organic Brain Damage From the Bender-Gestalt Test*, 23 J. CONSULTING PSYCH. 25, 33 (1959).

For a general discussion of the validity of psychiatric diagnosis, see Zigler &

the law in accordance with the more vociferous elements of the psychiatric community.

Justice Tobriner found the *M'Naghten* rule to be inconsistent with current legal and psychological thought: "We cannot continue to cast human beings in an ancient and discarded psychological mould. We must at least to the best of our limited ability accept the reality of the human psyche as expert opinion depicts it. . . ." <sup>65</sup> However, not only do psychiatrists disagree as to diagnostic judgments, but the accuracy of psychiatric predictions is alarmingly poor. <sup>66</sup> For example, one 1949 study measured diagnostic agreement between two or three psychiatrists who interviewed fifty-two patients in a psychiatric clinic. <sup>67</sup> The three psychiatrists involved in the experiment totally disagreed on specific diagnoses in thirty-one percent of the cases. <sup>68</sup> In a study conducted twenty years later, psychiatrists were found to be no closer to agreement in diagnosing mental illness than they were in 1949. In a 1969 study conducted by Katz, Cole, and Lowery, forty-three experienced psychiatrists diagnosed an individual after a filmed interview. <sup>69</sup> Seventeen of the psychiatrists concluded that the subject was psychotic; the other twenty-six concluded he

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Phillips, *Psychiatric Diagnosis: A Critique*, 63 J. ABNORMAL & SOC. PSYCH. 607, 612 (1961).

65. *People v. Drew*, 22 Cal. 3d 333, 352, 583 P.2d 1318, 1329, 149 Cal. Rptr. 275, 286 (1978). For an elucidation of the failures and advances of modern psychology, see Schmideberg, *The Promise of Psychiatry: Hopes and Disillusionment*, 57 NW. U.L. REV. 19, 21 (1962).

66. Paradoxically, the advances of psychology have produced confusion and disagreement concerning the most basic concepts. See, e.g., Stoler & Geertsma, *The Consistency of Psychiatrists' Clinical Judgments*, 137 J. NERV. MENTAL DIS. 58, 63-64 (1963).

It has been suggested that the courts are reluctant to curtail the influence of psychiatry because they do not want to assume full responsibility for deciding whether a mentally ill offender should be sent to prison or to the mental hospital. Judges may be motivated by sympathy to shift responsibility for this painful decision to psychiatrists. It is the contention of at least one writer that judges are obligated to assume a more active role in the insanity determination because of the injustice that may result if undue weight is given to psychiatric determinations. T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY 95-108 (1963). See generally Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974).

67. Ash, *The Reliability of Psychiatric Diagnoses*, 44 J. ABNORMAL & SOC. PSYCH. 272 (1949).

68. *Id.*

69. Katz, Cole, & Lowery, *Studies of the Diagnostic Process: The Influence of Symptom Perception, Past Experience, and Ethnic Background in Diagnostic Decisions*, 125 AM. J. PSYCH. 937 (1969).

was normal.<sup>70</sup>

The *Baxstrom* studies provide a clear example of the precarious reliability of psychiatric predictions.<sup>71</sup> In *Baxstrom v. Herold*,<sup>72</sup> the United States Supreme Court ordered the release or civil commitment of those prisoner-patients who had been kept in prison after expiration of their prison terms based upon a psychiatrist's diagnosis that they were dangerous. After the prisoners' transfer to a civil institution, psychiatrists studied their subsequent conduct.<sup>73</sup> In a study conducted by Hunt and Wiley one year after their release, 147 of the 969 offenders affected by the decision had been discharged to the community and the remaining 722 were found to be well behaved at the civil hospital.<sup>74</sup> Several years later, it was found that only two of the 262 prisoners who were then discharged had been subsequently convicted of serious crimes.<sup>75</sup> If the psychiatrists had been permitted to dictate their judgment to the court in this case, 969 human beings would have been condemned to live out their lives behind bars, without home visits and the other privileges granted civil patients.<sup>76</sup>

Insanity cannot be proved as a scientific fact in the manner that the determination of cancer or diseases of the body can be proved. Instead, the insanity determination is a highly subjective judgment based upon an individual decision of what is normal or acceptable behavior.<sup>77</sup> The pervasive influence of individual prejudice in psychiatric diagnosis has been documented by at least one researcher.<sup>78</sup> In a controlled experiment conducted by Lee and Temerlin in 1970, the diagnoses of psychiatric residents were found to be influenced significantly by the psychiatrist's imagination of the socio-economic history of the patient, independ-

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70. *Id.* at 939-40.

71. Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients 1966-1970*, 129 AM. J. PSYCH. 304 (1972).

72. 383 U.S. 107 (1966).

73. See, e.g., Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients 1966-1970*, 129 AM. J. PSYCH. 304 (1972); Hunt & Wiley, *Operation Baxstrom After One Year*, 124 AM. J. PSYCH. 978 (1968).

74. Hunt & Wiley, *supra* note 73.

75. Steadman & Keveles, *supra* note 73.

76. Ennis, *The Rights of Mental Patients*, in *THE RIGHTS OF AMERICANS* 484 (N. Dorsen ed. 1970).

77. The psychology that dominates the law can best be described as a concept that confuses morality and psychiatry. Insanity is a legal-medical constraint shaped to meet either conscious or unconscious policy objectives. H. SILVING, *ESSAYS ON MENTAL INCAPACITY AND CRIMINAL CONDUCT* 341-42 (1967).

The question of mental disease denotes theory, not fact. See Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 547 (1968). See also T. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY* 123-37 (1963).

78. See Temerlin, *Social Class, Diagnosis and Prognosis for Psychotherapy*, in *7 PSYCHOTHERAPY: THEORY RESEARCH & PRACTICE* 181 (1970).

ent of the clinical evidence.<sup>79</sup> If the psychiatrists perceived a history of lower socio-economic status, they were more likely to diagnose a greater degree of mental illness and a lesser likelihood of recovery.<sup>80</sup> The study revealed a class bias among psychiatrists against lower income persons.<sup>81</sup> Psychiatric diagnosis may be tainted by personal bias as well as class and cultural prejudice.<sup>82</sup> For example, a 1972 experiment conducted by Braginsky and Braginsky showed that patients who voiced any criticism of the mental health profession were likely to be diagnosed as mentally ill, whereas patients who flattered the examiner and the health profession were likely to receive a much more favorable diagnosis and prognosis.<sup>83</sup> Another study revealed that psychiatrists identified as normal and healthy those patients who tended to reflect the psychiatrist's own upbringing, personality structure, and personal problems.<sup>84</sup>

The *Drew* court refrained from adopting subpart 2 of the ALI test, which extends the defense of insanity to psychopaths and sociopaths.<sup>85</sup> Although judgment upon the exclusion of sociopaths and psychopaths from the defense was deferred, the new California test on its face would not deny the defense to those offenders. There has been a wide divergence of opinion among psychiatrists as to whether the term "mental disease" should embrace persons who repeatedly commit antisocial acts.<sup>86</sup> Psy-

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79. *Id.*

80. *Id.*

81. *Id.*

82. See Braginsky & Braginsky, *Psychologists: High Priests of the Middle Class*, PSYCH. TODAY, Dec. 1973, at 15, 139.

83. *Id.*

84. See Raines & Rohrer, *The Operational Matrix of Psychiatric Practice II: Validity in Psychiatric Impressions and the Projection Hypothesis*, 117 AM. J. PSYCH. 133 (1960).

85. *People v. Drew*, 22 Cal. 3d 333, 345 n.8, 583 P.2d 1318, 1324 n.8, 149 Cal. Rptr. 275, 281 n.8 (1978).

86. Because there has been no definitive answer to the question of how to deal with sociopaths or psychopaths, some commentators urge that the law presume no definitive answers. It is suggested that each case be decided upon an individual basis. R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 31 (1967).

A psychiatrist's willingness to classify a condition of the mind as a mental disease depends more on his personal philosophy than on factual criteria. H. WEIHOFEN, *THE URGE TO PUNISH* 86 (1956).

The concept of psychopathy is based upon the belief that the offender lacks "moral sense" or remorse. Sociologists emphasize the psychological normality of criminals. Their empirical studies have failed to demonstrate that neurotic or psychotic behavior is any greater in criminals than in the population at large. T. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY* 106 (1963).

chiatrists candidly confess that thus far they have been unsuccessful in developing any effective cure for these persons.<sup>87</sup> One recent English study concluded that fines, imprisonment, or probation would probably be more effective means of treating some psychopaths than hospitalization.<sup>88</sup> The English Commission also found a significantly lower rate of recidivism among psychopaths who had been jailed than among those who had received treatment at a psychiatric hospital.<sup>89</sup>

*The ALI Language Will Not Prove to be Any Easier to Interpret Than the M'Naghten Language*

The primary rationale the court cited for replacing the *M'Naghten* test was the superiority of the ALI terminology.<sup>90</sup> Specifically the *Drew* court listed four reasons it believed the ALI test was an improvement upon the *M'Naghten* test: (1) the "capacity to conform" language, (2) the "lack of substantial capacity" phrase, (3) the "capacity to appreciate" phrase, and (4) avoidance of the "all or nothing" language of *M'Naghten*.<sup>91</sup> In order to comprehensively evaluate the ALI test, the terms "as a result of" and "mental disease" must also be considered.

The opinion refers repeatedly to the burdensome task of reconciling the *M'Naghten* language with the modern psychiatric interpretation of insanity.<sup>92</sup> Ironically, application of the ALI test will probably necessitate continual reinterpretation because of the ambiguity of its terms. Moreover, there is some evidence that *Drew* may not significantly expand the defense beyond those classes of mentally ill offenders protected by *M'Naghten*.<sup>93</sup>

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87. See generally BRITISH COMMITTEE, *supra* note 15, at 83-97.

88. *Id.*

89. *Id.* at 84.

90. *People v. Drew*, 22 Cal. 3d 333, 346, 583 P.2d 1318, 1325, 149 Cal. Rptr. 275, 282 (1978).

91. *Id.*

92. In the opinion of the court, the continuing inadequacy of the *M'Naghten* test could not be remedied by further attempts to interpret language from a dated era of psychological thought. *Id.* at 345, 583 P.2d at 1324, 149 Cal. Rptr. at 281.

93. In a series of mock jury tests, researchers found that jurors generally could not distinguish between the *M'Naghten* and *Durham* tests. This would appear to apply equally to the ALI test, as it is a less radical departure from *M'Naghten* than was the *Durham* formula. R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 200 (1967).

"[I]t may be doubted that a change in the substantive formulation of the insanity defense will have any significant effect upon actual practice. . . ." Sherry, *Penal Code Revision Project—Progress Report*, 43 CAL. ST. B.J. 900, 916 (1968).

In formulating the *Currens* test, Judge Biggs based his reluctance to adopt the precise wording of the ALI test upon the belief that it made cognition too prominent and that jurors would use it to restore *M'Naghten* to the courtroom. *United States v. Currens*, 290 F.2d 751, 774 n.32 (3d Cir. 1961).

Criticism of the ALI rule has been nearly as pervasive as attacks upon the *M'Naghten* test.<sup>94</sup> The phrase "capacity to conform" has received the brunt of these condemnations.<sup>95</sup> "Capacity to conform" was especially favored by the *Drew* court because that phrase extends protection to persons suffering from volitional disorders.<sup>96</sup> Under *M'Naghten*, persons who could articulate the wrongfulness of their conduct but who were unable to control their behavior could not invoke the insanity defense.<sup>97</sup> The threshold issue presented by the "capacity to conform" phrase is whether the actor could have behaved in a different manner.<sup>98</sup> One commentator contends that such a determination is beyond the realm of rational and reliable prediction.<sup>99</sup> Other commentators suggest that this term reactivates the widely criticized theory of irresistible impulse.<sup>100</sup> This theory presumes that there are persons incapable of resisting the impulse to behave in a deviant manner and contends that such persons should be judged insane.<sup>101</sup> However, failure of the defendant to resist his aberrant impulse is often the only proof of his inability to conform.<sup>102</sup> Objection to the irresistible impulse theory focuses on the fact that absent a history of such behavior, there is no basis in logic or science for concluding that certain acts are irresistible. Yet psychiatrists testify as to inability to conform based upon the single act.<sup>103</sup>

The phrase "lack of substantial capacity" is also susceptible to differing interpretations depending on the interpretation of "sub-

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94. See, e.g., BRITISH COMMITTEE, *supra* note 15, at 221; H. SILVING, *ESSAYS ON MENTAL INCAPACITY AND CRIMINAL CONDUCT* 94-101 (1967).

95. The British Commission cites the test of "capacity to conform" as a principal reason for its rejection of the ALI test as a substitute for the *M'Naghten* rule. BRITISH COMMITTEE, *supra* note 15, at 221.

96. *People v. Drew*, 22 Cal. 3d 333, 346, 583 P.2d 1318, 1325, 149 Cal. Rptr. 275, 282 (1978).

97. *Id.*

98. H. SILVING, *ESSAYS ON MENTAL INCAPACITY AND CRIMINAL CONDUCT* 105 (1967).

99. *Id.*

100. See BRITISH COMMITTEE, *supra* note 15, at 221.

101. "Whatever may be the abstract truth, the law has never recognized an impulse as uncontrollable which yet leaves the reasoning powers—including the capacity to appreciate the nature and quality of the particular act—unaffected by mental disease." *People v. Gorshen*, 51 Cal. 2d 716, 726, 336 P.2d 492, 498-99 (1959).

102. See BRITISH COMMITTEE, *supra* note 15, at 221.

103. *Id.*

stantial.”<sup>104</sup> The code draftsmen have provided little clarification of this term.<sup>105</sup> Without guidelines, the criteria for substantial capacity will have to be determined on a case-by-case basis.

“Capacity to appreciate” adds nothing to the *M’Naghten* test. In fact, the *Drew* court frankly admitted that this is the same meaning that has been ascribed to *M’Naghten*’s “know” term.<sup>106</sup>

The “all or nothing” language of *M’Naghten* presumably refers to that rule’s exclusive emphasis upon cognitive disorders. This aspect of the opinion agrees with those commentators who claim the *M’Naghten* test language is too narrow.<sup>107</sup> However, the *Drew* court repeats this criticism without employing any independent analysis of the issue. The *M’Naghten* test as modernly applied does not compel an “all or nothing” decision of insanity based on the defendant’s capacity to know that his act was wrong. Interpretation of *M’Naghten* under the *Wolff* and *Wells* lines of cases demonstrates that the California version of *M’Naghten* is a flexible test.<sup>108</sup> The courts have required more than mere capacity to articulate knowledge of wrong as a bar to the defense. The defendant cannot be found criminally responsible unless he “appreciates and understands” the gravity of his act.<sup>109</sup> The *Cantrell* line of cases further liberalized the doctrine by permitting mitigation of a defendant’s punishment if the act was caused by irresistible impulse.<sup>110</sup>

Judge Bazelon, who has long advocated a flexible approach to criminal responsibility, was among the first commentators to criticize the “as a result” clause of the ALI test. In *United States v. Brauner*,<sup>111</sup> he vigorously assailed the “result” term as a reincar-

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104. See H. SILVING, *ESSAYS ON MENTAL INCAPACITY AND CRIMINAL CONDUCT* 98-99 (1967).

105. The code draftsmen merely indicated that “substantial incapacity” means that if capacity is greatly impaired, that should be sufficient for the purposes of the test. MODEL PENAL CODE § 4.01, Comment at 159 (Tent. Draft No. 4, 1955).

106. *People v. Drew*, 22 Cal. 3d 333, 346, 583 P.2d 1318, 1325, 149 Cal. Rptr. 275, 282 (1978). *Drew* confirmed the “capacity to appreciate” language of *People v. Wolff*, 61 Cal. 2d 795, 801, 394 P.2d 959, 962, 40 Cal. Rptr. 271, 274 (1964).

107. See H. SILVING, *ESSAYS ON MENTAL INCAPACITY AND CRIMINAL CONDUCT* 92 (1967). See also *United States v. Smith*, 404 F.2d 720, 724-26 (6th Cir. 1968).

Contemporary psychiatry and psychology emphasize that man’s social behavior is determined more by how he has learned to behave than by what he knows or understands. Therefore, if *M’Naghten* were strictly interpreted, as the commentators assume, it would offer limited protection to mentally disordered defendants. See J. POLIER, *THE RULE OF LAW AND THE ROLE OF PSYCHIATRY* 20-22 (1968).

108. See *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964); *People v. Wells*, 33 Cal. 2d 330, 220 P.2d 53 (1949).

109. *People v. Wolff*, 61 Cal. 2d 795, 800-01, 394 P.2d 959, 962, 40 Cal. Rptr. 271, 274 (1964).

110. *People v. Cantrell*, 8 Cal. 3d 672, 504 P.2d 1256, 105 Cal. Rptr. 792 (1973).

111. 471 F.2d 969, 1027 (D.C. Cir. 1972) (Bazelon, J., concurring in part and dissenting in part).



nation of the *Durham* "product" test. The product test had permitted psychiatrists to testify in conclusory terms and did not require testimony as to how they arrived at their decision.<sup>112</sup> As a result, the jury was denied the opportunity to determine as the trier of fact whether the defendant's act was caused by mental illness.<sup>113</sup> Because psychiatrists failed to establish a causative link between mental illness and the criminal act, juries did not believe that the act was a product of mental disease and tended to convict the defendant.<sup>114</sup> To avoid this consequence, the California courts may be forced to reinterpret the "as a result" phrase. The preferable alternative, however, would be to require psychiatrists to establish the causative link between mental illness and the act before being permitted to testify that the act was a result of mental disease.

*Drew* made no attempt to define "mental disease." Dr. Szasz contends that the term is meaningless, as "mental disease" denotes theory and not medical fact.<sup>115</sup> Therefore, what constitutes mental disease may vary widely from one psychiatrist to another, depending upon his individual concept of what behavior is sufficiently aberrant to constitute "disease." Adopting a standard based on individual philosophy may effectively preclude an insanity defense in certain cases but allow the defense in other cases, even though the diagnosed mental disorders in the two situations are identical.

#### *Will ALI "Rationalize" the Diminished Capacity Cases?*

Justice Tobriner states that adoption of the ALI formula "provides the foundation on which we can order and rationalize the convoluted and occasionally inconsistent law of diminished capacity."<sup>116</sup> Unfortunately, the opinion offers no more in the way of reasoned analysis or clarification than to express dissatisfaction with the doctrine's applications.<sup>117</sup> The opinion does not dis-

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112. *Id.* at 1022-23.

113. *Id.* at 1022-23, 1027.

114. *Id.* at 1023.

115. T. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY* 133 (1963).

116. *People v. Drew*, 22 Cal. 3d 333, 346, 583 P.2d 1318, 1325, 149 Cal. Rptr. 275, 282 (1978).

117. "If the defendant is charged with a general intent crime, he cannot raise a defense of diminished capacity. . . . If evidence of diminished capacity is used to negate criminal intent in a crime which contains no lesser offense . . . the defend-

cuss recent developments in the "diminished capacity" line of cases.

The recent "diminished capacity" cases show a marked trend toward merging that defense with the insanity exemption.<sup>118</sup> *People v. Wetmore*<sup>119</sup> compels the admission of all evidence of insanity at the guilt phase of trial if diminished capacity is pleaded. If insanity is also pleaded, the same evidence will be admitted a second time for the insanity trial. Because there is a duplication of evidence at both trials, bifurcation seems unnecessary.

*Drew's* adoption of the "capacity to conform" phrase of the ALI test may complete the merger of the two defenses as both diminished capacity and the "capacity to conform" standards speak to volitional disorders.<sup>120</sup> Merger of the two doctrines would eclipse the distinction between diminished capacity and insanity because diminished capacity would then satisfy the test for insanity.

At its inception, the diminished capacity standard was interpreted as only a partial defense to criminal responsibility.<sup>121</sup> It recognized varying degrees of mental incapacity by permitting mitigation of punishment for offenses committed by persons too disturbed to be held fully accountable for their acts.<sup>122</sup>

This was accomplished by recognizing a volitional disorder as a denial of specific intent in the crime charged, but allowing conviction on the lesser included offense if it required only a general intent.<sup>123</sup> Diminished capacity provided only a partial release from

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ant may secure his outright acquittal and release." *Id.* at 344, 583 P.2d at 1323-24, 149 Cal. Rptr. at 280.

118. *See, e.g., People v. Wetmore*, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978).

119. *Id.*

120. Diminished capacity speaks to those influences such as alcohol, disease or trauma which impair a person's volition, and thereby negate that person's capacity to entertain specific intent. *See, e.g., People v. Conley*, 64 Cal. 2d 310, 316, 411 P.2d 911, 914-15, 49 Cal. Rptr. 815, 818-19 (1966).

The *Currens* test for insanity adopted by the Third Circuit employed the following definition of insanity: "The jury must be satisfied that at the time of committing the act the defendant as a result of mental disease or defect lacked substantial capacity to conform his conduct to the requirements of the law he is alleged to have violated." *United States v. Currens*, 290 F.2d 751, 774 (3d Cir. 1961). In commenting on the *Currens* test Dr. Diamond has noted that the "capacity to conform" phraseology provides an opportunity for the expert to describe volitional disorders. Diamond, *From M'Naghten to Currens, and Beyond*, 50 CALIF. L. REV. 189, 191 (1962). Thus, California's incorporation of the "capacity to conform" language in *Drew* results in inclusion of volitional disorders in both the insanity test and the diminished capacity test. *See People v. Drew*, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978).

121. *See generally* Comment, *Diminished Capacity: The Middle Ground of Criminal Responsibility*, 15 SANTA CLARA L. REV. 911 (1974-1975).

122. *Id.* *See also* *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949).

123. Comment, *Diminished Capacity: The Middle Ground of Criminal Responsibility*, 15 SANTA CLARA L. REV. 911, 921 (1974-1975). For a contrast between the

penal culpability. In contrast with diminished capacity, the ALI test will provide a total exemption from punishment for volitionally disordered defendants.<sup>124</sup> Thus, "rationalization" of diminished capacity may mean elimination of the difference between insanity and diminished capacity and, therefore, expansion of insanity to include diminished capacity offenders.

### *Policy Issues Drew Failed to Consider*

The *Drew* court failed to consider what the community reaction might be to an expansion of the insanity defense.<sup>125</sup> At least one commentator maintains that any insanity standard should reflect community values.<sup>126</sup> Specifically, Dr. Goldstein contends that the decision to exempt a mentally disordered person from punishment necessarily requires a moral judgment.<sup>127</sup> In a democratic society such moral judgments are more appropriately made by the representative body than the courts.

One possible indication of the public point of view might be drawn from an analysis of a California Senate bill that was pending when *Drew* was decided.<sup>128</sup> The *Drew* court failed to acknowledge that the matter was under current legislative consideration.<sup>129</sup> Proposed Penal Code section 3302(a) set forth the fol-

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goals of psychiatry and the practical needs of law in the context of diminished capacity, see Comment, *A Punishment Rationale for Diminished Capacity*, 18 U.C.L.A. L. REV. 561, 571 (1971).

124. See *People v. Drew*, 22 Cal. 3d 333, 346, 583 P.2d 1318, 1325, 149 Cal. Rptr. 275, 282 (1978).

125. The public opposes expansion of the insanity defense because it fears that soft-hearted judges will find the perpetrators of crime insane and release them to prey upon the innocent. H. GOULETT, *THE INSANITY DEFENSE IN CRIMINAL TRIALS* 163-65 (1965); see Comment, *Diminished Capacity: The Middle Ground of Criminal Responsibility*, 15 SANTA CLARA L. REV. 911 (1974-1975).

For nonlegal commentary on the nature and complexity of the insanity defense and the general problem it presents to the public in the context of the "44 caliber killer" see Gambino, *The Murderous Mind: Insanity vs. the Law*, SATURDAY REV., March 18, 1978, at 10.

126. A. GOLDSTEIN, *supra* note 11, at 90-91.

127. *Id.*

128. S.B. 27, Cal. Legis., 1977-1978 Reg. Sess. § 1. The bill died in Senate but was revived after the *Drew* decision. See CALIFORNIA SENATE FINAL HISTORY, 1977-1978 REG. SESS. 30. See also S.B. 134, Cal. Legis., 1978-1979 Reg. Sess. The new bill, as amended August 29, 1979, deletes the insanity test set forth in the text but continues to operate under the assumption that diminished capacity is a viable defense. It sets forth procedures for examination of a defendant pleading diminished capacity. *Id.*

129. *People v. Drew*, 22 Cal. 3d 333, 355, 583 P.2d 1318, 1331, 149 Cal. Rptr. 275, 288 (1978) (Richardson, J., dissenting).

lowing definition of insanity:

[A] person is not criminally responsible for an offense if, at the time of the offense, as the result of a diseased or deranged condition of the mind, he lacked sufficient capacity to know or understand the nature and quality of his act or to know or understand that his conduct was wrong.<sup>130</sup>

The language of the proposal indicates a significantly narrower classification of mentally impaired offenders than that embraced by *Drew*.

Choice of the term "capacity to know" indicates that the proposal is like *M'Naghten* in that it emphasizes the cognitive aspects of mental disorders.<sup>131</sup> Similarly, the phrase "sufficient capacity to know or understand" nearly parallels the judicial construction given to "know" in *People v. Wolff*.<sup>132</sup> Significantly, there is no mention of the lack of "capacity to conform" which would broaden the scope of the defense to include the volitional characteristics of the ALI rule. The only cogent distinctions between the senate bill and *M'Naghten* are the "as the result of" clause and the characterization of insanity as a "diseased and deranged condition of the mind." Neither phrase would broaden the scope of the rule beyond those mental disorders recognized by the *M'Naghten* test.<sup>133</sup> This conservative definition of insanity is also more consistent with the public view of insanity than is the *Drew* test.<sup>134</sup>

Creating a fair and workable definition of insanity is more a policy issue than a medical-factual determination. In formulating such a policy decision, there should be a careful consideration of the objectives of the insanity defense, the patterns of conduct within prisons and mental institutions, and the societal consequences of confinement in mental institutions in contrast to prisons.<sup>135</sup> The extensive research required for a comprehensive

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130. S.B. 27, Cal. Legis., 1977-1978 Reg. Sess. § 1.

131. For interpretation of the language of the various insanity tests, see A. GOLDSTEIN, note 11 *supra*; H. SILVING, *ESSAYS ON MENTAL INCAPACITY AND CRIMINAL CONDUCT* 92 (1967).

132. 61 Cal. 2d 795, 800-01, 394 P.2d 959, 962-63, 40 Cal. Rptr. 271, 274-75 (1964).

133. In the March 6, 1979 amendment to proposed S.B. 134, Cal. Legis., 1978-1979 Reg. Sess., the committee stated that it was displeased with the *Drew* definition and set forth the following definition of insanity:

[I]nsanity means a diseased or deranged condition of the mind which makes a person incapable of knowing or understanding the nature and quality of his act or makes a person incapable of knowing or understanding that his act was wrong, in conformity with the definitions applied by the courts prior to such recent decisions.

This definition of insanity is almost identical to the proposed Penal Code § 3302(a). See text accompanying note 130 *supra*.

134. See generally H. GOULETT, *THE INSANITY DEFENSE IN CRIMINAL TRIALS* 163-65 (1965).

135. See Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853, 872 (1963); Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 546 (1968).

evaluation of these factors and the desirability of a societal mandate clearly indicate that the legislature is better suited for resolution of the insanity issue than the courts.<sup>136</sup>

### CONCLUSION

In *People v. Drew*, the California Supreme Court replaced the *M'Naghten* insanity test with a formula they believed would achieve a more accurate determination of criminal responsibility. However, the available evidence indicates that the ALI rule will not accomplish the changes the court sought to effectuate. Psychiatric testimony will continue to be phrased according to the test language. Psychiatrists will continue to testify in conclusory terms without adequate explanation of the factual bases for their conclusions. The ALI language will not prove any easier to apply than the *M'Naghten* test. Moreover, increased deference to an enhanced psychiatric role will not foster a more just and humane disposition of the accused, as the court believed it would. Adoption of the ALI rule may subsume the diminished capacity test without the court ever addressing the distinctions between diminished capacity and insanity.

Determination of a standard for criminal insanity necessarily involves a moral decision. As such it requires the participation of those who more directly represent the interests of the community

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136. The basic problem underlying the *Drew* analysis is that the California judiciary is institutionally ill-equipped to decide policy questions like the insanity definition. Resolution of such problems requires extensive accumulation and evaluation of scientific and sociological data. The California Supreme Court lacks the large staff and extensive fact finding resources which are available to the legislature. See generally Note, *Li v. Yellow Cab Company—Judicial Activism Illustrated*, 30 ARK. L. REV. 557, 569 (1977). See also Comment, *An Appraisal of Judicial Restraint*, 18 ST. LOUIS U.L.J. 75, 92 (1973).

Widespread utilization of the calendar memorandum is another reason the California Supreme Court should exercise prudence in considering broad policy changes. Use of the calendar memo often requires that painstaking research and analysis be sacrificed for the sake of expediency. What happens under this system is that when a case is accepted for hearing, responsibility for research and analysis passes to a single justice. That justice in turn, has his law clerk prepare a memorandum which, in essence, predetermines the resolution. The memo is circulated to the other members of the court, thereby devaluing the importance of oral argument. Johnson, *The Supreme Court of California 1975-1976, Foreword: The Accidental Decision and How It Happens*, 65 CALIF. L. REV. 231, 248-50 (1977).

California appellate courts employ an analogous procedure. Judges are often compelled to "take on faith" the other justices' comments on the calendar memorandum concerning the record in a particular case. See Wold, *Going Through the Motions: The Monotony of Appellate Court Decisionmaking*, 62 JUD. 58, 64 (1978).

at large and who are institutionally equipped to examine the spectrum of available experience and information. The issue of criminal insanity must be addressed by the California Legislature.

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